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19 SUPERIOR COURT OF THE STATE OF CALIFORNIA

20 COUNTY OF SAN MATEO

21 SIX4THREE, LLC, a Delaware limited liability
22 company,

23 Plaintiff,

24 v.

25 FACEBOOK, INC., a Delaware corporation;
26 MARK ZUCKERBERG, an individual;
27 CHRISTOPHER COX, an individual;
28 JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

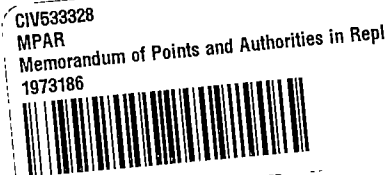
Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**DEFENDANT FACEBOOK, INC.'S REPLY
BRIEF REGARDING DISCOVERY AND
RELATED PROCEEDINGS**

Date: August 7, 2019
Time: 9:00 a.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015



FILED
SAN MATEO COUNTY

AUG 02 2019

By  Clerk of the Superior Court
DEPUTY CLERK

By Fax

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1 **I. INTRODUCTION**

2 Six4Three, LLC (“Six4Three”) and its former lawyers at Birnbaum & Godkin (“B&G”) have not
3 presented the Court with a single rule, statute, or case that requires that Facebook file a sanctions motion
4 or contempt affidavit before taking discovery. Instead, stripped of their bluster, the twenty-three pages
5 that Six4Three and its erstwhile lawyers submitted to this Court boil down to a frivolous invocation of a
6 single past-tense verb, and of *Koehler v. Superior Court*, a case that Six4Three and B&G contort beyond
7 recognition. Facebook is entitled to the discovery that it seeks, and this Court is entitled to have its
8 orders obeyed. Discovery can and should move forward.

9 **II. ARGUMENT**

10 **A. The Court Should Strike Birnbaum & Godkin’s Improper Filings.**

11 As a threshold issue, B&G’s purported Response to Facebook’s Opening Brief Regarding
12 Discovery and Related Proceedings should be stricken. The Court ordered the *parties* to file briefs
13 regarding discovery into the violations of this Court’s orders, and the briefing schedule specified dates
14 for “Facebook’s motion,” “Six4Three’s opposition,” and “Facebook’s reply.” *See* Order re: Six4Three
15 LLC’s Retention of Counsel & Setting Case Mgmt. Conf. at 1 (Aug. 1, 2019) (“August 1 Order”) (“The
16 *parties* shall brief a motion regarding discovery into the disclosure of Facebook’s Confidential and
17 Highly Confidential information, and the proposed timing and sequence of potential requests for relief by
18 Facebook.”) (emphasis added). B&G is not a party in this case. B&G is not counsel for any party in this
19 case. And B&G cannot have it both ways. B&G should not be permitted to act like a party when it sues
20 them—including by asking for leave to file an untimely motion for reconsideration of the Court’s March
21 15 Order Re: Facebook’s Motion to Open Discovery and to Compel—and a non-party when it comes to
22 discovery requests and sanctions. B&G’s unauthorized submission should be stricken.

23 **B. The Pending Anti-SLAPP Appeals Do Not Divest the Court of Jurisdiction to**
24 **Investigate Six4Three’s Misconduct.**

25 No party disputes that this Court can proceed with ancillary or collateral matters which do not
26 affect the judgment on appeal. Nevertheless, B&G—and notably *not* Six4Three—claims that the
27 pending anti-SLAPP appeals by the *parties* preclude the Court from acting because, according to B&G,
28 the discovery that Facebook seeks is embraced by those appeals. *See* B&G’s Resp. to Facebook’s

1 Opening Br. re: Disc. & Related Proceedings at 8:23–10:22 (July 31, 2019) (“B&G Resp.”). Not so.
2 The substance and merits of the anti-SLAPP appeals have nothing to do with Six4Three and its legal
3 team’s subsequent and repeated violations of this Court’s orders. That the disclosure of Facebook’s
4 confidential information appears to have included Six4Three’s voluminous anti-SLAPP opposition
5 papers—which this Court has described as “brute litigation overkill” and largely irrelevant to the
6 substance of the anti-SLAPP issues—does not change that fact. *See generally* Civ. Proc. Code § 916(a).¹
7 If it did, a party could bring any collateral matter into the scope of the anti-SLAPP discovery stay by
8 simply attaching documents or referencing the collateral matter in its anti-SLAPP papers, no matter how
9 irrelevant.

10 That is not the law. As Rutter explains, “[w]hether a particular matter is ‘embraced in’ or
11 ‘affected by’ an appealed . . . order . . . depends on whether the *purpose* of the stay (protection of the
12 appellate court’s jurisdiction) would be *frustrated* by further trial court proceedings on the matter.” Jon
13 B. Eisenberg et al., *California Practice Guide: Civil Appeals and Writs* §7:8 (Rutter Group 2018)
14 (emphasis added); *see also Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App.
15 4th 1168, 1173 (2000) (“If [trial court proceedings on the particular matter would have any impact on the
16 ‘effectiveness’ of the appeal], the proceedings are stayed; if not, the proceedings are permitted.”).² Here,
17 there is no reasonable dispute that Six4Three and its legal team’s violations of the Court’s orders have
18 nothing whatsoever to do with the anti-SLAPP issues on appeal. The pending appeals present the Court
19 of Appeals with the question of whether certain claims against Facebook and the Individual Defendants
20 arise from the exercise of First Amendment rights and whether those claims may proceed. No discovery
21 sought by Facebook will affect the appellate court’s ability to assess those legal questions and either
22 dismiss or reinstate the appropriate causes of action.

23 **C. The Court Retains Inherent Authority to Investigate Violations of Its Orders.**

24 Facebook’s opening brief explained at length that this Court has ample inherent authority to order

25 ¹ Unless otherwise noted, references to sections denote the California Code of Civil Procedure.

26 ² Six4Three is wrong that Facebook must “initiate a collateral proceeding” to move forward with matters
27 outside the scope of section 916’s stay. *See* Six4Three LLC (and Joined Third Parties’) Opp’n to
28 Facebook’s Opening Br. at 2:20–21 (July 31, 2019) (“Six4Three Opp’n”); *see also Henry M. Lee Law
Corp. v. Superior Court (Chang)*, 204 Cal. App. 4th 1375, 1383 (2012) (trial court retained jurisdiction to
hear motion to change beneficiary of attorney fee order under appellate review).

1 the discovery sought by Facebook. *See, e.g.,* Facebook’s Opening Br. re: Disc. & Related Proceedings at
2 8–9 (July 24, 2019) (“Opening Br.”). That authority derives from California’s Constitution and broadly
3 encompasses powers necessary to carry the Court’s orders into effect. *Id.* at 8 (quoting *Branson v. Sharp*
4 *Healthcare, Inc.*, 193 Cal. App. 4th 1467, 1476 n.4 (2011) (“***The power to enforce their decrees is***
5 ***necessarily incident to the jurisdiction of courts.*** Without such power, a decree would, in many cases,
6 be useless.”)). Among those powers is the power to investigate. *Johnson v. Banducci*, 212 Cal. App. 2d
7 254, 260 (1963).

8 Neither Six4Three nor B&G has any response to these authorities. Six4Three’s Opposition
9 addresses *only* the scope of California’s Civil Discovery Act. *See* Six4Three Opp’n at 2:18–4:3. And
10 B&G’s response actually *concedes* the “uncontroversial position that a court has the inherent authority to
11 ensure that its orders are followed.” B&G Resp. at 10:25–26. B&G tries to shrug off this concession by
12 retreating to the appellate stay. *See id.* at 10:28 (pending appeal, “the court is divested of such [inherent]
13 authority”). But that stay does not affect these proceedings, as explained above.

14 The bottom line is that this Court has inherent authority to investigate and ensure that its orders
15 are followed. It can do so now, because the discovery that Facebook seeks will not render futile the
16 pending appeals. Neither Six4Three nor B&G has offered any argument or authority to the contrary.
17 The analysis should end there.

18 **D. The Discovery Act Does Not Require that Facebook Move First and Discover Later.**

19 Utterly unable to challenge the Court’s inherent authority, the bulk of Six4Three and B&G’s
20 argument collapses to the assertion that, because section 2017.010 of the California Code of Civil
21 Procedure employs the verb “made,” Facebook must first move and only then seek discovery to support
22 that motion. *See, e.g.,* Six4Three Opp’n at 2:18–4:3. B&G goes farther still, demanding that the Court
23 “first *hear* FACEBOOK’s sanctions motion before allowing discovery to commence[.]” B&G Resp. at
24 14:23–24 (emphasis added).

25 Six4Three has cited no California court or commentator that has embraced its statutory
26 interpretation. And Facebook has not found one. To the contrary, discussing section 2017.010, Rutter
27 states that “information sought must be relevant to . . . ***the determination of a motion in that action.***”
28 Weil & Brown, *California Practice Guide: Civil Procedure before Trial* § 8:66 (Rutter Group 2019)

1 (citing Civ. Proc. Code § 2017.010) (emphasis added).

2 Without any support for their interpretation of the rule, both Six4Three and B&G resort to the
3 argument that the Court won't be able to make relevance determinations absent a filed motion. *See* B&G
4 Resp. at 6:5–8, 12:16–19, *and* Six4Three Opp'n at 3:27–4:2. But courts do that all the time. And this
5 Court has already done it here, approving in March a set of requests for production narrowly tailored to
6 Six4Three's misconduct. *See* Order re: Facebook's Mot. to Open Disc. & to Compel at 13:12–15 (March
7 15, 2019) ("March 15 Order"). Six4Three identifies no ambiguity in the scope of discovery to be taken
8 nor can there be one where the Court and parties have known for *eight months* the scope of contemplated
9 discovery. *See* Decl. of Laura E. Miller in Supp. of Def. Facebook's Mot. to Open Disc. & to Compel,
10 Exs. 33–36 (Jan. 8, 2019). The issues that are subject to discovery are specific and well-defined, and
11 have been known to all involved since Six4Three and its legal team's misconduct first came to light. At
12 this stage (i.e., while merits discovery is stayed pending appeal of the anti-SLAPP rulings), Facebook has
13 no interest in taking discovery unrelated to the improper disclosure of its confidential and highly
14 confidential information and the violations of the Court's orders by Six4Three and its representatives and
15 legal team. The only issue is whether Facebook's discovery requests are tied to uncovering evidence on
16 those subjects. The Court has already ruled that they are, and any follow-up discovery or issue can be
17 evaluated based on the scope of the underlying inquiry and the Civil Discovery Act. The suggestion that
18 this Court cannot call the balls and strikes on the scope of discovery into violations of its own orders
19 without a fully-briefed (and according to B&G, *heard*) motion defies common sense.

20 Ultimately, in this respect (and others), Six4Three's Opposition has it exactly backwards: it is not
21 that "the scope of the alleged violations of this Court's Orders remains disputed" until "a motion is
22 actually filed[.]" Six4Three Opp'n at 2:12–13. Rather, the scope of those violations will remain
23 disputed until Facebook gets answers in deposition and reviews documents that Facebook has sought
24 since last December. At that point, the parties will know the facts, Facebook will file a motion based on
25 those facts, and the Court will issue an order based on those facts.

26 **E. Facebook Is Not Required to Seek a Contempt Order for Six4Three's Violations.**

27 Six4Three repeatedly argues that Facebook has no option except contempt. *See* Six4Three Opp'n
28 at 4:13–15 (arguing that "a contempt proceeding" is "the proper remedial procedure" for violations of

1 this Court’s orders); *see also id.* at 4:20–21. But Six4Three’s briefing is bereft of a single authority
2 holding that contempt is the *exclusive* remedy to violations of court orders. Six4Three cites section
3 1209, but that section only defines contemptuous conduct; it says nothing about exclusive remedies for
4 violations. Six4Three’s position flies in the face of multiple statutes that provide non-contempt remedies
5 for order violations, including, section 177.5 (which provides for money sanctions for “any violation of a
6 lawful court order”) and section 2023.010 (which makes “[d]isobeying a court order to provide
7 discovery” conduct subject to sanction). Civ. Proc. Code §§ 177.5, 2023.010; *see also* Reply Declaration
8 of Catherine Y. Kim submitted herewith (“Kim Reply Decl.”), Ex. A, Courtroom Control, Contempt and
9 Sanctions § 3.11.B.1 (Center for Judicial Education & Research 2010) (“Consider CCP §177.5 sanctions
10 *in addition, or as an alternative, to contempt* for violation of a court order.”) (emphasis added).

11 Six4Three responds with *Powell v. County of Orange*, 197 Cal. App. 4th 1573, 1577 (2011), but
12 that case had nothing to do with sanctions or contempt. Indeed, neither word even *appears* in the *Powell*
13 opinion. *See id.* Even *Koehler v. Superior Court*, 181 Cal. App. 4th 1153 (2010)—Six4Three’s favorite
14 case—proves that sanctions are available to address violations of court orders. *See Koehler*, 181 Cal.
15 App. 4th at 1156 (noting that, following violation of “a court order” to return documents, third parties
16 “obtained an order awarding \$10,000 *in discovery sanctions*”) (emphasis added); *see also id.* at 1157.

17 Nor is there any “constitutional due-process” reason to require that Facebook initiate contempt
18 proceedings. *See* Six4Three Opp’n at 5:1–2. Black-letter constitutional principles hold that a person has
19 the right “not to answer official questions put to him in any . . . proceeding, civil or criminal, formal or
20 informal, where the answers might incriminate him in future criminal proceedings.” *Allen v. Illinois*, 478
21 U.S. 364, 368 (1986). Nothing about the discovery sought by Facebook strips Six4Three’s principal, or
22 individuals on Six4Three’s legal team, of that right. As for Six4Three itself, California and federal
23 courts long ago held that “a corporation does not have the Fifth Amendment privilege against self-
24 incrimination.” *People v. Superior Court (Keuffel & Esser Co.)*, 181 Cal. App. 3d 785, 788 (1986)
25 (citing *Bellis v. United States*, 417 U.S. 85, 90 (1974)). So from the perspective of Six4Three—the only
26 party whose views this Court solicited—Fifth Amendment rights simply do not enter the analysis.

27 **F. *Koehler v. Superior Court* Imposes No Requirement on the Sequence of Discovery.**

28 Six4Three and Birnbaum & Godkin both retreat to *Koehler*. *See* Six4Three Opp’n at 5:15–6:6,

1 and B&G Resp. at 12:25–13:19. That reliance is misplaced: *Koehler* is not a case about sanctions.
2 *Koehler*’s petitioner challenged only a contempt order issued by a trial court without an initiating
3 affidavit and without personal service. *Koehler*, 181 Cal. App. 4th at 1164, 1169; *see also* Kim Reply
4 Decl. Ex. B, Hr’g Tr. at 20:9–12 (Mar. 13, 2019) (“[The Court]: I read [*Koehler*]. I read it right before
5 or right after I became a judge. There is no contempt order that’s being issued. So what’s the basis for
6 the reference?”). In *Koehler*, the appellate court’s discussion of the trial court’s error was specific and
7 clear. *See* 181 Cal. App. 4th at 1169 (“The third **contempt proceeding** was improper in at least four
8 particulars.”) (emphasis added). No initiating affidavit had been filed, personal service had not been
9 effected, the order itself failed to make requisite findings, and the court improperly calculated the number
10 of acts of contempt. *Id.* That is all that *Koehler* teaches.

11 In light of this analysis, Six4Three and B&G’s discussion of *Koehler* can be described, most
12 charitably, as misleading. B&G tells the Court that a “sanctions proceeding[]” cannot “properly begin”
13 without an “appropriate affidavit.” B&G Resp. at 13:9–10. B&G says that this “was the case in
14 *Koehler*.” *Id.* at 13:9. It was not. In *Koehler*, the trial court had already issued sanctions, and it was the
15 petitioner’s violation of the sanctions order that led to the subsequent contempt proceedings that are the
16 focus of the Court of Appeal’s opinion. 181 Cal. App. 4th at 1158–65. The issue before the court was
17 whether **contempt** proceedings could begin without an initiating affidavit, not whether an affidavit was
18 necessary for the original sanctions proceedings. *Id.* at 1167–69. Likewise, the firm’s citation to
19 *Koehler*’s discussion of the Rothman treatise selectively omits each appearance of the word “contempt”
20 from *Koehler*’s discussion (there are four) to try to suggest that the procedures outlined in *Koehler*
21 extend beyond contempt proceedings. *See id.* at 1171. Try as it might, B&G cannot crop the word
22 contempt out to try to extend *Koehler* to the circumstances faced by this Court. *Koehler* grounds its
23 analysis firmly in “[t]he procedures for punishing direct, hybrid, and indirect contempt[.]” *Koehler*, 181
24 Cal. App. 4th at 1157 (citation omitted); *see also id.* at 1169 (citing Civ. Proc. Code § 1211(a) (“When
25 the **contempt** is not committed in the immediate view and presence of the court, or of the judge at
26 chambers, **an affidavit shall be presented . . .**”) (emphases added).) For that reason, none of the
27 nineteen decisions citing *Koehler* finds the case relevant to the exercise of any sanction power *except*
28 contempt.

1 **G. The Status of Six4Three's Representation Is No Bar to Discovery.**

2 This Court's order directing Six4Three's Opposition explicitly stated that Six4Three "did not
3 comply with this Court's previous order" by obtaining limited scope counsel. *See* August 1 Order at
4 1:10–11. Six4Three could have used its Opposition to clarify whether Six4Three has full-scope
5 representation. But instead, Six4Three continued to obfuscate: Six4Three claimed that it "has retained
6 counsel," Six4Three Opp'n at 7:5, but submitted no attorney declaration attesting to that claim and no
7 supplement or modification to the notice of limited-scope representation filed on July 2, 2019.
8 Confusing matters further, Six4Three claims that if Six4Three becomes unrepresented "in the future for
9 any reason," then "discovery should not be allowed to proceed." *See* Six4Three Opp'n at 7:7–9. But
10 Six4Three gives no support for that proposition. The one case that it cites, *Merco Construction*
11 *Engineers, Inc. v. Mun. Court*, 21 Cal. 3d 724 (1978), says nothing about discovery against
12 unrepresented corporations—the case concerned only the Legislature's authority to amend judicial rules
13 about corporations proceeding in *propria persona*. *See* Six4Three Opp'n at 7:10–11 (citing *Merco*
14 *Constr. Eng'rs*). Nor does Six4Three address Facebook's authorities establishing Facebook's right to
15 take discovery from an unrepresented corporation. *See* Opening Br. at 12:4–13.

16 For its part, B&G drops all pretense of litigating "only the issues directed to B&G," B&G Resp.
17 at 4:5, and repeatedly relies on Six4Three's representation as a reason to halt discovery or hear B&G's
18 improper reconsideration motion.³ *See, e.g., id.* at 4:10–12, and 4:26–27. But B&G's recitation is
19 replete with falsehoods. For example, B&G states that this Court issued the March 15 Order "while
20 Plaintiff, a corporation, was without counsel." B&G Resp. at 4:26–27; *and* at 8:4–7 (describing March
21 15 hearing as "one such legal matter . . . decided while Plaintiff was without counsel"). B&G and its
22 counsel *know* these sentences are false: this Court had not ruled on B&G's withdrawal motion on March
23 15, 2019. *See* Order Granting Mot. to Withdraw (Apr. 30, 2019). On that date, B&G still represented
24 the client that B&G had agreed to represent, subject to California's rules regarding attorney withdrawal.
25 *See* Facebook's *Ex Parte* Appl. for Order Enforcing Stipulated Protective Order at 14 (Feb. 25, 2019);
26

27 ³ This elision is particularly egregious at page 4, lines 26–27, where *B&G* asserts a violation of
28 *Six4Three's* due process rights as "one basis of *B&G's* Motion to Reconsider." B&G Resp. at 4:26–27
(emphasis added). B&G begged for months to quit this case; it cannot now backseat-drive when
advantageous.

1 *see also* Kim Reply Decl. Ex. C, Hr’g Tr. at 19:16–18 (Nov. 30, 2018) (Mr. Godkin stating “we are still
2 counsel of record of course until Six4Three should engage [sic] replacement counsel.”). Later, B&G
3 asserts that Facebook has “no case law to support [the] position” that discovery may proceed against
4 unrepresented corporations. *See* B&G Resp. at 5:8–9. Wrong. Facebook has cited that law. *See*
5 Opening Br. at 12:4–13. Six4Three and B&G just have no response.

6 **H. The Court Should Not Delay Discovery Pending Resolution of B&G’s Improper**
7 **Motion for Reconsideration.**

8 Facebook explained above why B&G’s submission is improper and should be stricken. But to the
9 extent this Court considers B&G’s request that B&G’s reconsideration motion precede discovery, *see*
10 B&G Opp’n at 10:23–12:6, that request should be denied.

11 First, B&G’s request is untimely. Page limits on this brief preclude deep examination of this
12 question, but the California Code of Civil Procedure gives a non-moving party affected by an order just
13 10 days to seek reconsideration. *See* Civ. Proc. Code § 1008(a). This Court read the March 15 Order
14 verbatim to B&G’s lawyers and into the record on March 15, 2019. Notice of Entry of Order at 1 (May
15 28, 2019). Those lawyers included the order in an appellate filing on April 17, 2019. *Id.* By any
16 measure, therefore, B&G’s deadline to seek reconsideration ran months ago.

17 Second, B&G’s reconsideration request would fail on the merits. The “primary grounds for
18 B&G’s motion” is B&G’s assertion that Six4Three “was unrepresented” at the March 15, 2019 hearing.
19 B&G Resp. at 11:6–8. But that’s false: the Court took B&G’s withdrawal motion under submission on
20 March 13, 2019 and decided that motion on April 30, 2019. *See* Order Granting Withdrawal (Apr. 30,
21 2019). Six4Three had lawyers—including B&G itself—on March 15, and those lawyers were duty-
22 bound to represent their client’s interests. And contrary to B&G suggestion, there has been no finding to
23 the contrary. B&G claims that this Court “[found] COUNSEL was legally and ethically barred from
24 advising or representing SIX4THREE on any matters based on FACEBOOK’S allegations against
25 SIX4THREE and COUNSEL.” B&G Resp. at 7:24–27. B&G gives no citation for this statement,
26 because it is false. This Court allowed withdrawal, but the Court’s order doing so made no finding as to
27 B&G’s purported “conflict.” *See* Order Granting Withdrawal (Apr. 30, 2019). Likewise, B&G
28 misrepresents the substance of the appellate court’s order: contrary to B&G’s briefing, the First District

1 Court of Appeal *never* “found that Plaintiff, . . . was without counsel during the time in question by
2 virtue of the clear conflict of interest between Plaintiff and Plaintiff’s counsel that had been created by
3 Facebook’s allegations of misconduct against Plaintiff and Plaintiff’s counsel as co-conspirators.”
4 *Compare* B&G Resp. at 11:8–12, with Kim Reply Decl. Ex. D, Order denying petition for writ of
5 mandate (July 19, 2019). Nor did the appellate court “recognize[], [that] the evidence is undisputed that
6 Plaintiff was unrepresented at the time of the hearing[.]” *Compare* B&G Opp’n at 11:28–12:2, with Kim
7 Reply Decl. Ex. D. B&G is flatly misrepresenting the words of this Court and three appellate justices in
8 order to stifle discovery into Six4Three’s misconduct. There is no basis for reconsideration here.

9 **I. Six4Three’s Talismanic Invocation Of Paragraph 16 Cannot Delay Discovery.**

10 Perhaps recognizing that its army of procedural straw men cannot stand up to scrutiny under the
11 law, Six4Three and B&G continue to cling to Paragraph 16 of the Protective Order as some sort of
12 lifeline to justify their actions, and now, delay discovery. *See, e.g.*, B&G Resp. at 6:14–22, Six4Three
13 Opp’n at 5:11–12. But that lifeline is as flimsy as the rest of their arguments.

14 Facebook has repeatedly explained why Section 16 is irrelevant to these proceedings. *See, e.g.*,
15 Facebook’s Resp. re: Nov. 20 Order at 17 & n.4 (Nov. 28, 2018). By its terms, Section 16 applies only
16 to “*a subpoena or court order issued in other litigation[.]*” Stip. Protective Order § 16 (emphasis
17 added) (Oct. 25, 2016). The DCMS Committee’s letters were neither. Indeed, Mr. Godkin himself
18 appeared to understand this in the days leading up to Mr. Kramer’s disclosures. On November 19, 2018,
19 Mr. Godkin alerted Facebook to Section 16 and demanded that Facebook “seek relief in the Parliament of
20 the United Kingdom[.]” Kim Reply Decl. Ex. E at 2 (Godkin Letter to Mehta (Nov. 19, 2018). Hours
21 later, Facebook e-mailed this Court, copying Mr. Godkin, to request an immediate *ex parte* hearing
22 regarding the DCMS Committee’s letters. Facebook did *not* say that it would seek relief from the
23 committee itself. *See* Kim Reply Decl. Ex. F (Miller Email to Court (Nov. 19, 2018)). Nevertheless, the
24 next day, Godkin wrote to Mr. Collins and said that Facebook was “seeking *appropriate relief from the*
25 *Superior Court of California,*” and that Mr. Kramer was therefore “unable to comply with the Order[.]”
26 Kim Reply Decl. Ex. G (Godkin Letter to Collins (Nov. 20, 2018) (emphasis added). Mr. Godkin had it
27 right back then: Section 16 did not free Mr. Kramer to leak Facebook’s confidential and highly
28 confidential information. Six4Three has never defended its failure to notify Facebook when Mr. Kramer

1 received document requests from Damian Collins in early November 2018. Nor does Section 16 provide
2 Mr. Kramer a defense to his violation of this Court's November 20, 2018 order that "[n]o unredacted
3 copies . . . shall be transmitted, released or submitted, until further order of the Court." *See* Order at
4 2:19–21 (Nov. 20, 2018).

5 Moreover, even leaving the DCMS disclosures aside, Six4Three violated this Court's orders in
6 ways that Section 16 cannot possibly cover. Mr. Kramer had access to and possession of Facebook
7 documents designated highly confidential, even though section 5 of the Protective Order forbade it. *See*
8 Decl. of Theodore Kramer in Supp. Pl.'s Brief in Resp. to Nov. 20, 2018 Order ("Kramer Decl.") ¶ 18,
9 Ex. 3 (confirming possession of documents containing confidential and highly confidential information)
10 (Nov. 26, 2018); *see also* March 15 Order at 9:9–11; Stip. Protective Order § 5 (Oct. 25, 2016). B&G
11 gave Mr. Scaramellino access to Facebook documents designated highly confidential, even though he
12 never executed a Protective Order Certification allowing such access. Decl. of Zachary G. F.
13 Abrahamson in Supp. of Facebook's Opp'n to B&G's Mar. 15, 2019 Mot. to Seal, Ex. 5 (Decl. of
14 Thomas Scaramellino in Compliance with Amended Case Management Order No. 19, Ex. 1). Six4Three
15 and its legal team violated the Protective Order's Section 3 prohibition against using confidential or
16 highly confidential information for purposes beyond this litigation countless times, by sharing summaries
17 of Facebook's confidential and highly confidential information with journalists, media entities, members
18 of the government, and/or non-profits involved in investigating Facebook or publishing articles about
19 Facebook, and by sharing such protected information with a purported expert so that this expert could
20 serve as a source for the news media about that information. *See* March 15 Order at 3–13. Each of these
21 violations of the Court's orders independently supports the discovery sought without implicating Section
22 16 of the Protective Order, even under Six4Three's and B&G's broken interpretation of that provision.

23 **III. CONCLUSION**

24 For the reasons above and set forth in Facebook's opening brief, the Court should order
25 Facebook's requested discovery and enter the briefing schedule for sanctions proposed in Facebook's
26 opening brief.
27
28

1 Dated: August 2, 2019

DURIE TANGRI LLP

2
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On August 2, 2019, I served the following documents in the manner described below:

☒ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from cortega@durietangri.com to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 2, 2019, at San Francisco, California.


Christina Ortega